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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO FLOREZ MAGANA, Defendant and Appellant.	D074709 (Super. Ct. No. INF1501678)

APPEAL from a judgment of the Superior Court of Riverside County, Harold W. Hopp, Judge. Reversed in part, sentence vacated and remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Charles C. Ragland and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alejandro Florez Magana of carjacking (Pen. Code,[1] § 215, subd. (a); count 1), assault with a firearm (§ 245, subd. (a)(2); count 2), unlawful possession of a firearm (§ 29800, subd. (a)(1); count 3), and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count 4).[2] It found true allegations that in the commission of the carjacking and assault Magana personally used and intentionally discharged a firearm proximately causing great bodily injury (§§ 12022.5, subd. (a), 12022.53, subds. (b), (d), 1192.7, subd. (c)(8)) and that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a), 1192.7, subd. (c)(8)). The jury found true allegations that as to counts 1, 2 and 4, the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)), and as to count 1, that he acted as a principal for the gang's benefit (§ 12022.53, subd. (e)). It further found true that Magana had suffered a prior serious felony and strike conviction (§§ 667, subds. (a)(1), (c), (e)(1), 1170.12, subd. (c)(1)).[3] The trial court sentenced Magana to a total prison term of 31 years eight months plus 55 years to life, consisting of 30 years to life plus 25 years to life

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1 Statutory references are to the Penal Code unless otherwise specified.

2 The jury did not execute a verdict form for a count 5 charge of receiving a stolen vehicle (§ 496d, subd. (a)) after the prosecutor argued, and the court instructed, that it could not find Magana guilty of both count 4 and count 5 because they were charged in the alternative. The court dismissed the count 5 charge.

3 The People report that the jury found true that Magana's prior conviction also constituted a prior a prior prison term conviction (§ 667.5, subd. (b)), and the trial court imposed but stayed the one-year term on that enhancement. The jury's verdict form states that the prior conviction constituted a "serious felony," and a prior conviction "within the meaning of . . . sections 667, subdivision (c) and (e)(1), and 1170.12, subdivision (c)(1)," indicating a prior strike. We address the prior prison term enhancement in part V(5), *post*.

for the carjacking and attached firearm enhancement on count 1; a consecutive term of 23 years (six years for the assault, ten years for the gang enhancement, three years for the great bodily injury enhancement, and four years for the firearm enhancement) on count 2; a consecutive one-year four-month term on count 3; and a consecutive two-year four-month term (one year four months for the offense plus one year for the gang enhancement) on count 4.

Magana contends that (1) the trial court erred and violated his right to due process by admitting involuntary statements he made to investigators; (2) the court erred by instructing the jury with CALCRIM No. 306 that the jury could consider the late disclosure of defense evidence in reaching their verdict; (3) his conviction for unlawful taking of a vehicle must be reversed because the People failed to prove the value of the vehicle exceeded $950; (4) the count 2 assault and the count 4 vehicle theft were part of the same continuous course of conduct as the count 1 carjacking, and thus the sentences on counts 2 and 4 should have been stayed under section 654; and (5) in light of Senate Bill No. 620, his case must be remanded to permit the trial court to exercise its discretion whether to strike or dismiss the imposed firearm enhancements. In supplemental briefing, Magana additionally contends remand is required for resentencing because the court erroneously believed it had no discretion to impose concurrent terms under the "Three Strikes" law, and the court must exercise its discretion to strike the five-year enhancement for his prior serious felony conviction under new amendments to section 667, subdivision (a) and 1385.

We conditionally reverse the judgment as to the count 4 offense of unlawful taking or driving and remand the matter with directions that the trial court permit the People to elect to retry a felony violation of Vehicle Code section 10851 or accept a reduction of that conviction to a misdemeanor. We also vacate Magana's sentence, and based on some of the People's concessions with which we agree, direct the court to resentence Magana as set forth below. We otherwise affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

At about 4:00 a.m. on September 12, 2015, J.V., an Army reservist, was sitting in her 2009 Honda Fit waiting for her boyfriend to come over and say goodbye before she was to leave for weekend drills. Her car, which she had purchased three weeks earlier, was parked near the entrance of the apartment complex where J.V. lived with her aunt. It was dark outside and the only light inside of the car was from J.V.'s stereo.

At some point J.V. noticed three or four men in baggy clothing walking down the street toward the entrance to the apartment complex. She then saw the individuals behind her car and became scared. One man, identified by J.V. at trial as Magana, ran up to the driver's side window; J.V. saw he was carrying a black gun and wearing a black and white bandana that covered his face from the nose down. He tapped the window with the gun and said, "Get off the car." J.V. unsuccessfully tried to open the door. Magana then shot through the car window, hitting J.V. in the hand. J.V. finally got the car door open and ran to her apartment. She looked back and saw Magana in her vehicle. When she looked again, he had driven away. A woman who was nearby working a night shift heard

a loud noise shortly after 4:20 a.m., and looked to see a tree knocked down and three men in a car with dealer plates struggling to drive away with a flat tire.

A few hours later, police found J.V.'s car a couple of miles from her apartment. Forensic technicians found Alex Ceballos's fingerprints on the car's left rear door handle, but no physical evidence linked Magana to the car. Based on the fingerprint evidence, police arrested Ceballos.

Five days after the incident, a friend of Magana's mother overheard Magana talking with others outside his house, saying that he had panicked because he shot a lady, and he was worried because he had left a shirt in the car. She heard they had left a party at about 3:00 in the morning and did it because they wanted the car. Using a pseudonym, the friend went to police and reported what she heard. After that interview, police searched Magana's home and recovered a black bandana with white markings on it as well as a notebook inscribed with his gang moniker.

Damen Butvidas, a lead investigator with the Riverside County Sheriff's Department, interviewed Magana at the station.[4] Investigator Butvidas gave Magana his warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and asked Magana if he knew why he was being interviewed. Magana denied knowing why, but when Investigator Butvidas represented that Magana's DNA had been found in the victim's stolen car, Magana claimed he had been at a party but had seen the car parked with its door open and checked inside it to look for money. He denied knowing about the car's

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4 Another investigator, Michael Luna, participated in the interview at some points.

theft or the victim's shooting and he denied committing the crime, telling anyone that he had shot a lady, or bragging about it. After further questioning, Magana stated he found the car parked in the street with the keys inside and drove it to where police had located it, but no girl was in the car. Though Magana repeatedly denied shooting any girl, at one point, Investigator Butvidas asked Magana if he would be a "man of honor, a man of integrity" like the victim, who he referred to as a "woman of honor . . . [who] didn't deserve that. [¶] . . . [¶] And I'd hate to think that you did that shit on purpose." Magana responded, "I didn't do that on purpose." Magana then returned to denying that he shot the victim. After Investigator Butvidas again told Magana that his DNA was found on the car's steering wheel and asked Magana to tell him what happened, the following exchange occurred:

"Magana: What . . . does that shit even carry?

"Butvidas: Oh—oh I don't know. That's up to the DA's office, Bro. I don't make that determination but I think if somebody feels bad about what—what happened and they're honest about what happened I'm sure that helps with decisions that are made later down the road. I don't have anything to do with that, okay?

"Magana: That's already attempted murder, no?

"Butvidas: Was it on purpose?

"Magana: No it wasn't on purpose.

"Butvidas: Okay. Tell me what happened. It just went off, huh?

"Magana: Like I told you I wouldn't want to shoot no fuckin' (unintelligible)."

Magana admitted finding the car and driving it, but continued to deny that what he did was "on purpose" or that he had shot a girl. Investigator Butvidas responded that Magana should stop "trying to bullshit [him]." Investigator Luna asked Magana to consider whether the victim was someone's sister or mother; an unidentified man in the room then said, "You would want us to find out exactly if it was an accident or if it was on purpose. You would want us to go through and find out to make sure we get the right—we do the right thing and like you said attempted murder or if it was just something that happened, right?"

Butvidas continued the questioning, telling Magana that only his DNA was found on the steering wheel and telling only partial truths made him look as if he did not "feel bad for what you did . . . " He told Magana to "man up and admit what you did," and that it was time for Magana to own up to his mistake. Magana said that he just wanted to go home, and in response to Butivas's repeated requests to recount what happened, told Butvidas he was "drunk [and] drugged up" and did not remember anything. Butvidas continued to accuse Magana of committing the crime and remembering what happened, but feeling bad about it. Magana alternately responded that he did not shoot the girl, he did not remember shooting a girl, and he "didn't know she was a chick in uniform." He then repeated that he did not remember anything and wanted to take a lie detector test. Finally, Investigator Butvidas offered that Magana could "prove how bad [he felt] about things" and again asked Magana to tell him what happened. Butvidas began suggesting a version of how events occurred to Magana, but expressed confusion about whether Magana was nodding yes and agreeing to it. He asked Magana if he would rather write a

letter of apology to the victim. Magana asked that the recorder be turned off but the investigator declined, saying, "What am I gonna write?" Magana began reciting a letter while Butvidas transcribed: "I'm sorry. I didn't mean to do that, I was—I was on, you know, drugs, drunk. I didn't even know it was a girl. [¶] . . . [¶] . . . I didn't know there was a girl in the car. The gun just went off, it was an accident. [¶] . . . [¶] Yeah, I feel—I feel—I feel real bad, you know? I didn't even have my glasses, I can't see that much. So I didn't know it was a girl. I didn't even see her uniform. I was just drunk—drunk. I don't remember that much. [¶] . . . [¶] I didn't mean to, you know? The gun just—it was—it was an accident, you know? If I really wanted to shoot her, I would've straight up, just let off everything." Investigator Butvidas asked Magana what kind of gun it was and Magana stated, "Uh, I think it was a revolver," and that he had thrown it in the trash. Magana said the girl then "got off" the car and was screaming; he did not know if she was just scared or if he hit her.

DISCUSSION

I. *Claim of Involuntary Statements to Investigators*

Before trial, Magana's counsel sought to exclude some of Magana's statements to the interviewing investigators as involuntary and the product of an asserted promise of leniency by Investigator Butvidas. The People produced Investigator Butvidas, who testified he did not promise Magana that if Magana were to make a statement that he committed the crime he would get a deal, that the People wouldn't prosecute, or that he would be treated more lightly by the district attorney's office. Butvidas acknowledged telling Magana that "if somebody feels bad about what happened and they're honest about

what happened, I'm sure that helps with decisions that are made later down the road." Magana's counsel confirmed that immediately after making that statement Butvidas said, "I don't have anything to do with that."

Stating it had reviewed the transcript and parts of the lengthy interview, and basing its ruling in part on *People v. Jones* (1998) 17 Cal.4th 279 and *People v. Higareda* (1994) 24 Cal.App.4th 1399, the court admitted Magana's statements, ruling they were voluntary and Investigator Butvidas did not make an implied promise of leniency.

Magana repeats his arguments below, contending his incriminating statements to the investigators were involuntary, and that the trial court violated his due process rights by admitting them into evidence. Specifically, he maintains his admissions were the direct and immediate response to Investigator Butvidas's implied promise of leniency that occurred when Butvidas said he did not determine what sentence any crime would carry "but . . . if somebody feels bad about what . . . happened and they're honest about what happened I'm sure that helps with decisions that are made later down the road." Magana contends the error was prejudicial, not harmless beyond a reasonable doubt under the standard of *Chapman v. California* (1967) 386 U.S. 18 because his statement to investigators was the strongest evidence of guilt on his charges.

A. *Legal Principles*

" '[A]n involuntary confession may not be introduced into evidence at trial.' [Citation.] In determining whether a confession is involuntary, we consider the totality of the circumstances to see if a defendant's choice to confess was not ' "essentially free" ' because his will was overborne by the coercive practices of his interrogator." (*People v.*

Spencer (2018) 5 Cal.5th 642, 672; see also *People v. Linton* (2013) 56 Cal.4th 1146, 1176-1177; *People v. Carrington* (2009) 47 Cal.4th 145, 169; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1249-1250.)

" ' "Once a suspect has been properly advised of his [or her] rights, he [or she] may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect . . . . Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession . . . ." ' " (*People v. Carrington, supra,* 47 Cal.4th at p. 170.)

A confession that is elicited by any promise of benefit or leniency, whether express or implied, is involuntary. (*People v. Tully* (2012) 54 Cal.4th 952, 993; *People v. Perez* (2016) 243 Cal.App.4th 863, 871.) A confession also may be found involuntary " ' "if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' [Citation.] The statement and the inducement must be causally linked. [Citation.]" [Citation.]' [Citation.] A confession is not rendered involuntary by coercive police activity that is not the 'motivating cause' of the defendant's confession." (*People v. Linton, supra,* 56 Cal.4th at p. 1176; *People v. Falaniko, supra,* 1 Cal.App.5th at p. 1250; *Perez,* at p. 877.) " ' " 'When the benefit

pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made." ' " (*Tully*, at p. 993; *Falaniko*, at p. 1250.)

Thus, in *People v. Jones*, *supra*, 17 Cal.4th 279, the California Supreme Court held the People had proved the defendant voluntarily made incriminating statements when during his " 'low-key' " and " 'nonthreatening' " interrogation the interrogator told him that while he could "make no promises regarding the decisions the district attorney would make in his case . . . that he would intercede with the district attorney on defendant's behalf, telling the district attorney that defendant had been honest." (*People v. Jones*, at pp. 297-298.) The court found "nothing improper" in this statement (*id*. at p. 298); the investigators did not know the full extent of what the defendant had done and "in such circumstances, the detective's offers of intercession with the district attorney amounted to truthful implications that his cooperation might be useful in later plea bargain negotiations." (*Ibid*.) This was so even though the defendant perceived the interrogator's comment as a " 'promise[] that you'll go over and talk to the District Attorney and tell 'em . . . .' " (*Ibid*.) And in *People v. Higareda*, the court rejected the argument that a promise of leniency was made by a detective who told the defendant " 'if he spoke the truth I would talk to the District Attorney . . . if he told me the truth . . . it would be up to the District Attorney upon [*sic*] any other further action of the case.' " (*People v. Higareda*, *supra*, 24 Cal.App.4th at p. 1409.)

On the other hand, in *People v. Linton*, the court found an implied promise of leniency made by an interviewing detective's statement to the defendant that he would not

" 'get in trouble' " for his prior sexual assault of the murder victim and it was "water under the bridge." (*People v. Linton*, *supra*, 56 Cal.4th at pp. 1174, 1177.) The court, however, held the promise was not the motivating cause of the defendant's subsequent admissions and confession. (*Id*. at p. 1177.) The record showed the defendant wanted to tell the detective about his killing and the prior assault on the night of the murder before his station interview, and he did not immediately respond to the promise by admitting his sexual interest or sexual conduct with the victim, but only admitted the prior rape attempt later. The record did not "substantiate the claim that defendant's admissions/confession and any promise of leniency were ' "causally linked." ' " (*Id*. at p. 1177.) In *People v. Perez*, *supra*, 243 Cal.App.4th 863, a panel of this court found a defendant's statements were "clearly motivated by a promise of leniency, rendering the statements involuntary" and requiring reversal when an interviewing sergeant told him if he told the truth and was honest then "we are not gonna charge you with anything," after which the defendant confessed. (*Id*. at pp. 866, 869-870.)

" 'The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. [Citation.]' [Citation.] ' " 'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.' [Citation.]" [Citation.] " '[W]hen a reviewing court considers a claim that a confession has been improperly coerced, if the evidence conflicts, the version most favorable to the People must be relied upon if supported by the record.' " ' " (*People v. Jones* (2017) 7 Cal.App.5th 787, 810,

quoting *People v. Tully*, *supra*, 54 Cal.4th at p. 993; see also *People v. Falaniko*, *supra*, 1 Cal.App.5th at pp. 1249-1250.) Where the facts of the admission are undisputed to the extent the interview was tape-recorded, as here, the issue is subject to de novo review. (*People v. Perez*, *supra*, 243 Cal.App.4th at p. 877.)

B. *Analysis*

Here, Magana makes no claim of physical intimidation or deprivation, or any coercive tactics other than the contents of the interrogation itself. (Accord, *People v. Spencer*, *supra*, 5 Cal.5th at p. 672.) He does not dispute he was given proper *Miranda* warnings and waived his rights. (*Spencer*, at p. 672.) And having read the transcript, we observe no investigator in this case engaged in name-calling, obvious strong-arm tactics, or base appeals to deeply held beliefs, and there is no indication Magana feared them. (*Id.* at p. 673.) Magana's answers were coherent and deliberate, and he had the "wherewithal to articulate—time and again—a version of events that minimized his involvement." (*Ibid*.) The fact Butvidas repeatedly suggested Magana was lying did not taint the investigation and is not an improper interrogation technique "as an interrogation may include ' "exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect." ' " (*Id*. at p. 674.) Nor does Butvidas's assertedly false representations that police had found Magana's DNA in the vehicle compel a finding of involuntariness. (*Id*. at p. 675 [citing cases that such deception was not of a type reasonably likely to procure an untrue statement and was unlikely to produce a false confession].)

Magana characterizes the record as showing Investigator Butvidas's "insisten[ce] from the outset of the interview that [he] choose between admitting the shooting was an accident, or being deemed a 'monster' for having shot the victim on purpose."[5] He maintains that Butvidas's statement about remorse and honesty helping with "decisions made later down the road" was a tactic and either an implied or direct promise of leniency to coerce his cooperation and admission. Magana also points to the unidentified man's remark that if it were Magana's mother or sister Magana would want to know whether the shooting was intentional or accidental, characterizing that as "reinforc[ing] [Magana's] perception that if he admitted the shooting as an accidental act, he would be afforded a reduced charge or leniency by the prosecution." He seeks to distinguish *People v. Jones*, *supra*, 17 Cal.4th 279 and *People v. Higareda*, *supra*, 24 Cal.App.4th 1399, and compare the circumstances to those in *People v. Cahill* (1994) 22 Cal.App.4th 296.

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[5] Investigator Butvidas only suggested Magana "didn't mean for it to happen" and asked Magana whether the shooting was an accident or not, saying at one point: "I don't think it's fair to you for me to paint you as a monster 'cause you're really not." Later, he said, "So, you know, what's it gonna be, Bro? Are you that—are you that monster, dude, or are you that . . . ." When Magana interjected that he wasn't a monster, Investigator Butvidas said, "Right, I think you were drunk and the gun went off. Right?" None of this questioning amounted to name-calling and it did not appear to cow Magana, who continued to deny shooting the victim. The investigator's suggestion that Magana did not intend to shoot the victim is a permissible interrogation tactic. (*People v. Spencer*, *supra*, 5 Cal.4th at p. 675 [citing cases holding that suggestions by interrogating officers that the defendant may not have been the actual killer or may not have intended that the victim die were a permissible interrogation tactic]; see, e.g., *People v. Jones, supra*, 7 Cal.App.5th at p. 812 [police sergeant's suggestion to defendant that defendant did not mean to kill the victim but only to cut him did not amount to an implied promise of leniency].)

We are not persuaded by these arguments. Looking at the totality of the circumstances, including the investigators' statements themselves and their nexus to Magana's incriminating statements, Magana's claim that his admissions were involuntarily given is unavailing. We do not see Investigator Butvidas's statement about honesty as either an implicit or explicit promise of leniency. " ' "[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary . . . ." ' " (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 812, quoting *People v. Holloway* (2004) 33 Cal.4th 96, 115; see also *People v. Higareda*, *supra*, 24 Cal.App.4th at p. 1409.) The investigator's statement about "decisions made later down the road" promised nothing about Magana's possible punishment or charges, unlike the interrogator's explicit promise that authorities would not "charge you with anything" in *People v. Perez*, *supra*, 243 Cal.App.4th at pages 869-870. In fact, Investigator Butvidas made clear that he did not have "anything to do with that . . . ." And the statement was not accompanied by any threat. If anything, Investigator Butvidas's remark was a "truthful implication[] that [Magana's] cooperation might be useful in later plea bargain negotiations" as in *People v. Jones*, *supra*, 17 Cal.4th at p. 298 and is akin to the statement in *Higareda* (*supra*, at p. 1409) that was held not to be a promise of leniency. (See also *Holloway*, at p. 117 [detective's "general assertion that the circumstances of a killing could 'make[] a lot of difference' to the punishment" was not materially deceptive and detectives did not cross the line between permissibly urging a suspect to tell the truth

by factually outlining the benefits flowing from confessing, and impermissibly impliedly promising lenient treatment in exchange for a confession].)

The transcript thus reveals no threats or promises of leniency so as to render Magana's incriminating statements involuntarily made. And these circumstances are not comparable to *People v. Cahill, supra,* 22 Cal.App.4th 296, in which the court found a threat or promise of leniency made by police officers who urged the defendant to admit to a killing in order to show it was not premeditated and thus not first degree murder. (*Id.* at p. 314.) The officers gave a "materially deceptive" account of the state of homicide law by telling him he would not face the death penalty if the killing was not premeditated, when in fact the crime was committed during a burglary, so that an admission to involvement in the crime amounted to a confession to felony murder. (*Id*. at p. 315.) Investigator Butvidas gave no such deceptive assurances.

Even if we were to construe Investigator Butvidas's remark to be some implicit promise of benefit or favorable treatment by prosecutors, it was not the " 'proximate' " (*People v. Tully, supra,* 54 Cal.4th at p. 986) or " 'motivating cause of [Magana's] decision to speak.' " (*People v. Jones, supra,* 7 Cal.App.5th at p. 812.) Investigator Butvidas's remark about honesty was on page 60 of an 81 page interview transcript. After the statement was made, Magana did not immediately make his incriminating statements about shooting the victim; he repeated a statement he had already made before Butvidas's honesty remark: that "it wasn't on purpose," and then resorted back to telling Butvidas that he had only taken the car, did not remember what happened, and did not shoot the girl. It was not until ten pages later that Magana began dictating his

incriminating statements to Butvidas in the form of an apology letter, after Butvidas asked him if he "would at least tell this girl that you—how bad you feel . . . ." Under these circumstances, Butvidas's honesty remark was not the cause of Magana's confession. (Accord, *People v. Wall* (2017) 3 Cal.5th 1048, 1066-1068 [detective's remark that if defendant "told the truth—he could 'go on with [his] lie' and 'be with [his] wife and child and start fresh' " was not the cause of defendant's confession where the defendant had already begun to tell the detectives what had happened, and no other circumstances of the interrogation unduly heightened the pressure on the defendant to confess].)

II. *Claim of Erroneous Instruction with CALCRIM No. 306*

Days before trial was to begin, Magana's defense counsel notified the court and prosecutor of the existence of alibi witnesses who would testify that Magana was at a birthday party from about 11:00 p.m. until about 4:00 on the morning of the shooting. The court denied Magana's counsel's continuance request based on that development, but under Evidence Code section 402 permitted counsel to question the witnesses concerning the incident and their delay in coming forward. The court stated it would instruct the jury with CALCRIM No. 306 as to the untimely disclosure of the witnesses.

The court read CALCRIM No. 306 to the jury as follows: "Both the People and the defense must disclose their evidence to the other side before trial within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the defense failed to disclose the names and identifying information of

alibi witnesses within the legal time period. In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] However, the fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed the crime."

Magana contends the trial court erred by so instructing the jury because CALCRIM No. 306 was "confusing and interjected an amorphous consideration of the discovery rules into the jury deliberations." He argues the instruction is flawed, citing *People v. Saucedo* (2004) 121 Cal.App.4th 937; *People v. Cabral* (2004) 121 Cal.App.4th 748 and *People v. Bell* (2004) 118 Cal.App.4th 249, which address the predecessor instruction, CALJIC No. 2.28.[6] (See *People v. Thomas* (2011) 51 Cal.4th 449, 481-482 [describing holdings of *Saucedo*, *Cabral*, and *Bell*].) Though Magana agrees that CALCRIM No. 306 has cured many of the prior jury instruction's defects, he

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6 CALJIC No. 2.28 provided: " ' "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the Defendant failed to timely disclose the following evidence: . . . [¶] Although the Defendant's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence." ' " (*People v. Riggs* (2008) 44 Cal.4th 248, 307, fn. 26, quoting *People v. Bell*, *supra*, 118 Cal.App.4th at p. 254.)

maintains it still "failed to provide sufficient guidance on how the untimely disclosure might affect the jury deliberations, which was problematic here since there was no evidence the tardy disclosure disadvantaged the prosecutor." According to Magana, because the instruction told the jury that the defense had violated the discovery law but did not tell the jury what the law was comprised of or how to evaluate the violation, the jury was " 'left to speculate.' " Magana argues the instruction was prejudicial and violated his constitutional rights to due process and a fair trial.

The People respond that Magana forfeited the claim by failing to assert a more specific objection to the instruction. They argue the instruction did not affect Magana's substantial rights because the California Supreme Court's decision in *People v. Riggs*, *supra*, 44 Cal.4th 248 establishes it is not flawed as Magana asserts. They further argue any error in instructing the jury is harmless given the overwhelming evidence of Magana's guilt.

Though we disagree with the People's claim of forfeiture in part,[7] we reject Magana's contentions. In assessing claims of instructional error, " '[t]he relevant inquiry . . . is whether, "in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice."

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7 As the People acknowledge, "[a] reviewing court may review an instruction even absent an objection 'if the substantial rights of the defendant were affected thereby.' " (*People v. Hardy* (2018) 5 Cal.5th 56, 91, quoting section 1259.) The question is whether "the *asserted* error would generally have affected defendant's substantial rights" (*ibid.*, italics added), and here, some of those asserted errors would. Magana's contentions are cognizable with the exception of those challenging the completeness of the instruction. (See *People v. Riggs*, *supra*, 44 Cal.4th at p. 309.)

[Citation.] Also, " ' "we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " ' " (*People v. Landry* (2016) 2 Cal.5th 52, 95; see also *People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.) We interpret instructions to support the judgment if they are reasonably susceptible to such interpretation (*Vang*, at p. 1129), and avoid "hypertechnical parsing . . . ." (*People v. Speegle* (1997) 53 Cal.App.4th 1405, 1413.)

Here, CALCRIM No. 306 is not "substantially mirrored" by former CALJIC No. 2.28 as Magana contends, but instead cures several of the defects found in the former instruction. (See *People v. Riggs*, *supra*, 44 Cal.4th at p. 307 [CALCRIM No. 306 was "extensively revised" from CALJIC No. 2.28]; see *People v. Thomas*, *supra*, 51 Cal.4th at p. 484, fn. 6 ["CALJIC No. 2.28 has since been modified to address the concerns expressed in *People v. Bell* . . . and its progeny"].) The revised instruction no longer permits the jury to draw from the discovery violation an inference of defendant's consciousness of guilt, but expressly tells them such violation "is not evidence that the defendant committed the crime," precluding any such inference. It also does not attribute the discovery violation to the defendant, but expressly places the fault on counsel. In these ways, similar to the modified instruction given in *Riggs* (44 Cal.4th at pp. 305, 307), CALCRIM No. 306 does not raise the concerns expressed by the court in *People v. Bell*, *supra*, 118 Cal.App.4th 249, in which the court found it "misleading to suggest that 'the defendant' bore any responsibility" and did not tell the jurors that the discovery violation was insufficient of itself to prove guilt. (*Id*. at p. 255, 256.)

Magana further contends CALCRIM No. 306 "failed to provide sufficient guidance on how the untimely disclosure [of alibi witnesses] might affect the jury deliberations . . . ." He complains CALCRIM No. 306 "told the jury that the defense violated the discovery law, but did not tell the jury how to go about evaluating this violation, or what the discovery law is comprised of." As in *Riggs* (*People v. Riggs*, *supra*, 44 Cal.4th at p. 309), Magana forfeited these claims by failing to request clarifying or amplifying language. (See *People v. Hardy*, *supra*, 5 Cal.5th at p. 91 [" '[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial' "].)

Magana suggests these deficiencies are "problematic here since there was no evidence [his] tardy disclosure disadvantaged the prosecutor." But as the court in *Riggs* held, this circumstance, if true, does not lead to a conclusion that the instruction is erroneous. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 308.) *Riggs* rejected any argument that a court's decision whether to instruct on this subject must be restricted to circumstances where there is an "actual effect on the other party's ability to respond to the evidence," explaining that regardless of whether the prosecution was impaired, a jury could infer from the discovery violation the defendant's cognizance that his evidence lacked credibility. Thus, the discovery violation is probative on the evidence's weight: "Were a jury to find a defendant had failed to disclose evidence to the prosecution in an attempt to hide the evidence until the last minute, the jury could reasonably infer from the fact that the defendant thereby violated his or her duty under the discovery statutes that even the defense did not have much confidence in the ability of its own evidence to

withstand full adversarial testing. Whether or not the prosecution was actually impaired by the attempt to conceal the evidence would not change the circumstance that defendant tried to inhibit the prosecution's efforts. In other words, while not constituting evidence of the defendant's consciousness of his or her own guilt, the fact of a discovery violation might properly be viewed by the jury as evidence of the defendant's consciousness of the lack of credibility of the evidence that has been presented on his or her behalf." (*Ibid.*) In the absence of a lower court finding absolving the defendant of seeking to gain a tactical advantage, the instruction given in *Riggs* was not erroneous. (*Id*. at pp. 308-309.)

Here, CALCRIM No. 306 limited the jury's consideration of defense counsel's late production of alibi evidence to assessing its "weight and significance," which is a proper purpose as *Riggs* explains. Nor does it violate Magana's state and federal constitutional rights to a fair trial. We disagree that the instruction "*encouraged* the jury to discredit [Magana's] most crucial defense witnesses because of a procedural error" as he claims. Rather, reasonably and fairly interpreted, the instruction simply told the jury it *may* consider the discovery violation on the alibi evidence's weight and sufficiency. Such an instruction was proper: "The fact [Magana] failed to comply with his obligations under the discovery statutes by presenting these surprise alibi witnesses . . . was relevant evidence the jury could consider in assessing the credibility of their testimony. The trial court was authorized by statute to 'advise' the jury of this fact (§ 1054.5, subd. (b)), and its instruction to that effect properly explained that it was for the jury to determine what, if any, weight and significance the discovery violation carried in resolving the credibility of the alibi testimony." (*People v. Riggs*, *supra*, 44 Cal.4th at p. 310.) In sum, we

disagree that the instruction suffers from the same defects as CALJIC No. 2.28 and that the court erred in giving it under these circumstances.

Finally, even if we were to assume CALCRIM No. 306 suffers from some flaws, we would conclude any error in giving the instruction was harmless. We agree with the People that ample evidence of Magana's guilt—via his admissions to Investigator Butvidas, the testimony of his mother's friend that she overheard Magana admitting he shot a lady and took her car, and J.V.'s trial testimony that she was "[p]ositive 100 percent" that she recognized Magana as her assailant—rendered any error harmless under the prejudice standard of either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California, supra*, 386 U.S. at p. 24. (See *People v. Riggs, supra*, 44 Cal.4th at p. 311 [holding there was no reasonable probability that an outcome more beneficial to the defendant would have been achieved in the absence of the instruction under *Watson* and that any federal constitutional error was harmless beyond a reasonable doubt under *Chapman*]; accord, *People v. Thomas, supra*, 51 Cal.4th at p. 484 [pointing in part to defendant's failure to dispute evidence he had sexual intercourse with the victim then killed her].) This is so even in the face of the testimony of Magana's alibi witnesses, who did not go to police or testify at Magana's preliminary hearing despite claiming they knew or heard Magana was at a birthday party on the morning in question and was at home afterwards about the time of the shooting. Thus, "[i]t was not the instruction that made the alibi defense implausible but its inexplicable materialization" more than a year after Magana's arrest and shortly before trial. (Accord, *Riggs*, at p. 311.) We cannot say

there is any reasonable possibility or probability the instruction, even if erroneous, affected the outcome or fairness of Magana's trial. (*Ibid*.)

III. *Challenge to Conviction of Felony Unlawful Taking of a Vehicle*

Magana contends his conviction for felony unlawful taking of a vehicle (Veh. Code, § 10851) must be reversed because the prosecutor did not prove that J.V.'s 2009 Honda vehicle was worth more than $950, which, after Proposition 47 took effect in November 2014, must be proven to obtain a felony conviction of the theft version of that offense. (See *People v. Page* (2017) 3 Cal.5th 1175, 1181, 1183, 1186-1187 [taking a vehicle with intent to permanently deprive the owner of possession is a form of theft and a defendant convicted of violating Vehicle Code section 10851 with such intent has suffered a theft conviction]; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 855 [where defendant is entitled to the benefit of Proposition 47, "to obtain a felony conviction for vehicle theft, the People were required to prove as an element of the crime that the . . . car he took was worth more than $950"]; *In re D.N.* (2018) 19 Cal.App.5th 898, 901.) He points out that based on the evidence and jury instructions, the jury could not have convicted him of a nontheft violation of Vehicle Code section 10851, and thus his felony conviction cannot stand as one for merely driving without intent to steal.[8]

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8 In making the latter contention, Magana points to the fact the jury convicted him of the count 4 offense, and did not render a verdict on the count 5 offense after being instructed that the vehicle theft count was alternative to the count 5 offense of receiving stolen property: "What that means is if you find guilty on one, you must find not guilty on the other. Meaning that if you believe that all this individual did was just happened to come across a car and knew it was stolen and then moved it for a short period of time knowing it was stolen, then count 5, you find him guilty, and the taking, count 4, you find

The People concede that Magana was entitled to the benefit of Proposition 47, the prosecutor did not prove the vehicle's value, and thus the "record cannot support a guilty verdict for felony vehicle theft." However, relying on *People v. Gutierrez*, *supra*, 20 Cal.App.5th 847, they assert the appropriate remedy is to remand for the prosecutor to elect to retry Magana on this count with proper jury instructions or reduce the conviction to a misdemeanor. They argue the problem is not insufficiency of the evidence but that the "jury instructions that failed to adequately distinguish among, and separately define the elements for, each of the ways in which [Vehicle Code] section 10851 can be violated." (*Id*. at p. 856.)

We agree with the People that the proper remedy is to remand the matter to permit the People to either elect to retry Magana for felony vehicle theft with proper jury instructions or accept a reduction of that conviction to a misdemeanor. (Accord, *People v. Jackson* (2018) 26 Cal.App.5th 371, 381; *People v. Bussey* (2018) 24 Cal.App.5th 1056, 1064, review granted September 12, 2018, S250152; see, e.g., *In re J.R.* (2018) 22 Cal.App.5th 805, 819 [remanding to give People option to attempt to prove felony Vehicle Code section 10851 violation at new jurisdictional hearing or accept reduction to misdemeanor]; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) Magana was arrested in September 2015, eight months after the passage of Proposition 47, and his trial

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him not guilty." Even if Magana's contention is correct, it does not speak to the proper disposition. The People do not ask us to affirm Magana's felony conviction under Vehicle Code section 10851 or argue that the jury convicted him on a valid posttheft driving theory, as the Attorney General did in *People v. Jackson* (2018) 26 Cal.App.5th 371, 379.

took place in January 2017. After the close of evidence, the court instructed the jury with the preexisting pattern jury instruction on felony vehicle theft, CALCRIM No. 1820, as follows: "The defendant is charged in count 4 with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; and, [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time." The instruction thus allowed the jury to convict Magana of a felony violation of Vehicle Code section 10851 even though no value was proved. (Accord, *People v. Gutierrez*, at p. 857.)

At the time of Magana's trial, at least three published decisions had held that Proposition 47 did not apply to Vehicle Code section 10851. (See *In re J.R.*, *supra*, 22 Cal.App.5th at p. 819 [discussing *People v. Page* (2015) 241 Cal.App.4th 714, decided on October 23, 2015, review granted January 27, 2016, S230793, and acknowledging split]; *In re D.N.*, *supra*, 19 Cal.App.5th at p. 903, fn. 1 [discussing *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted November 30, 2016, S237975 & *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041, holding Proposition 47 did not apply, versus *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344, applying Proposition 47 to vehicle theft]; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at pp. 854, 858, fn. 11 [listing lower court decisions addressing issue].)

It was not until November 30, 2017, well after Magana's trial and sentencing, that the California Supreme Court decided *People v. Page*, *supra*, 3 Cal.5th 1175, which acknowledged the distinction between the theft and nontheft versions of the offense (*id.* at p. 1183) and resolved the split in the appellate courts as to whether a Vehicle Code section 10851 conviction was eligible for resentencing under Proposition 47. (See *Page*, at p. 1187 & fn. 4.) Before deciding *Page*, while the court had granted review in the several cases addressing the issue, the state of the law was such that the People could not reasonably have predicted the outcome of the court's decision, and we decline to fault the prosecutor for not presenting evidence of J.V.'s vehicle's value. Thus, this is a situation where "evidence is not introduced at trial because the law at that time would have rendered it irrelevant . . . ." (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 72) Remand to permit the People to prove that element under proper instructions is thus proper. (*Ibid*.; see also *People v. Eagle* (2016) 246 Cal.App.4th 275, 280 [where a fact was not relevant to the charges at the time of trial and question was never tried, retrial is not barred by double jeopardy or ex post facto principles].)

In reaching this conclusion, we disagree with *In re D.N.*, relied upon by Magana, in which the court held double jeopardy principles bar retrial in these circumstances. (*In re D.N.*, *supra*, 19 Cal.App.5th at p. 903, citing *People v. Shirley* (1982) 31 Cal.3d 18, 71, superseded by statute on other grounds as stated in *People v. Alexander* (2010) 49 Cal.4th 846, 879.) The *D.N.* court reasoned that in view of the passage of Proposition 47, "the People were . . . on notice as of November 5, 2014, that vehicle theft under Vehicle Code section 10851 was to be a misdemeanor unless the value of the stolen vehicle exceeded

$950" and "should have been well aware the value of the stolen vehicle was relevant on whether the offense was a felony . . . ." (*In re D.N.*, at p. 903.) But the *D.N.* court's reliance on *People v. Shirley* for this proposition is unpersuasive. In *Shirley*, the court explained that the double jeopardy rule "achieves its aim—i.e., of protecting the defendant against the harassment and risks of unnecessary repeated trials on the same charge—by the device of giving the prosecution a powerful incentive to make the best case it can at its first opportunity. [Citation.] But the incentive serves no purpose when, as here, the prosecution did make such a case under the law as it then stood; having done so, the prosecution had little or no reason to produce other evidence of guilt." (*Shirley*, at p. 71.) Under such circumstances " 'reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.' [Citation.] Rather, the matter is governed by the settled rule that the double jeopardy clause does not prohibit retrial after a reversal premised on error of law." (*Ibid.*)

V. *Sentencing Issues*

1. *Section 654 Stay of Consecutive Terms on Counts 2 and 4*

Magana contends that under section 654 the trial court should have stayed the sentences for his convictions on the count 2 assault with a firearm and the count 4 unlawful taking of a vehicle, as those offenses took place during a single course of conduct with a single objective, and they were simultaneous with and incidental to the

carjacking.[9] The People concede the court should have stayed Magana's sentence on count 4 because that offense was incidental to the carjacking. However, they maintain the court properly imposed a consecutive sentence on count 2 because the assault with a firearm was a gratuitous act of violence against J.V., who was an unresisting victim.

Section 654, subdivision (a), provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives. [Citations.] At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. [Citation.] When those facts are undisputed . . . the application of

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9 Magana did not raise section 654 below, but Magana did not forfeit this sentencing challenge. "It is well settled . . . that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654." (*People v. Scott* (1994) 9 Cal.4th 331, 354 & fn.17.)

section 654 raises a question of law we review de novo." (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312 (*Corpening*).)

The California Supreme Court most recently discussed section 654 in *Corpening*. That case involved a carjacking in which the assailant accosted the victim at gunpoint and ordered him out of the van he was sitting in, which was loaded with valuable coins. (*Corpening*, *supra*, 2 Cal.5th at p. 309.) The victim then tried to wrest the gun away and stop the robbery, resulting in him being dragged down a driveway before falling to the pavement. (*Ibid*.) The court imposed consecutive sentences for the robbery and carjacking, which the high court held was error. It held the forceful taking of the van—and the rare coins contained inside it—was a single physical act for purposes of section 654 because that act simultaneously accomplished the actus reus requirement for both the robbery and the carjacking, despite the fact the acts could be "broken down into constituent parts." (*Id*. at p. 315.)

Under *Corpening*, *supra*, 2 Cal.5th 307, we conclude section 654 precludes separate punishments for the carjacking and the assault here. One of the elements of carjacking is the use of "force or fear to take the vehicle or to prevent [the] person from resisting." (CALCRIM No. 1650; see also § 215 [carjacking is "accomplished by means of force or fear"].) Magana, wielding his gun and tapping the window of J.V.'s car with it, demanded that she get out of the vehicle, then shot her through the car window, after which J.V. exited the car and ran to her apartment. The forceful taking of J.V.'s car accomplished by use of the gun, and the assault with a firearm, constituted a single act because the assault simultaneously accomplished the actus reus requirement for both

offenses. (See *People v. Nunez* (2012) 210 Cal.App.4th 625, 629 [defendant swung a hammer at the victim, striking him, after which the defendant entered the victim's vehicle and drove away; that assault with a deadly weapon was "the sole means of committing the carjacking" thus the court of conduct was indivisible and "the two crimes were committed so close in time that they were contemporaneous if not simultaneous" and use of the hammer was "not a 'gratuitous act of violence' or an 'afterthought' "].) *Corpening, supra,* 2 Cal.5th at p. 316 ["Where the same physical act accomplishes the actus reus requirement for more than one crime, that single act cannot give rise to multiple punishment"].) And even if we were to view Magana's acts as constituting a course of conduct encompassing several acts, that course of conduct would not reflect multiple intents and objectives. (*Id*. at pp. 311-312.) There is no evidence Magana had a different intent and objective in assaulting J.V. with the gun than in forcibly taking her car at gunpoint.

As stated, the People rely on the principle that "an act of 'gratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not "incidental" to robbery for purposes of Penal Code section 654.' " (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1016.) In *Bui*, involving convictions for attempted murder and robbery, the appellate court held that where "the evidence showed that [the] defendant continued to shoot [the victim] after he fell to the floor, face down, unable to move," the defendant's intent and objectives were factual questions for the trial court. (*Ibid*.; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272 (*Cleveland*) [defendant beat the 66-year-old victim "senseless, such that the attempted murder cannot be viewed as

merely incidental to the robbery"].) In *Cleveland*, the court reasoned that " 'at some point the means to achieve an objective may become so extreme they can no longer be termed "incidental" and must be considered to express a different and more sinister goal than mere successful commission of the original crime. . . . [¶] . . . [¶] . . . [S]ection [654] cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.' " (*Cleveland*, at p. 272.) Thus, the *Cleveland* court upheld "the finding [the defendant] had separate and simultaneous intents . . . ." (*Ibid.*)

Cleveland, *supra*, 87 Cal.App.4th 263 analyzed the gratuitous violence issue as bearing on separate intents and objectives. But under *Corpening*, if a single physical act serves as the basis for convicting the defendant of two separate crimes as here, it is irrelevant whether the defendant harbored multiple intents and objectives for purposes of section 654. (*Corpening*, *supra*, 2 Cal.5th at p. 316; *People v. Mesa* (2012) 54 Cal.4th 191, 199; *People v. Louie* (2012) 203 Cal.App.4th 388, 397 ["A single criminal act, even if committed incident to multiple objectives, may be punished only once"].) Under the circumstances, Magana's sentence for the count 2 offense should have been stayed. On resentencing following the People's election as to count 4, the court is directed to stay the sentence on that conviction under section 654.

2. *Section 12022.5 and 12022.53 Firearm Enhancements*

Magana contends his case must be remanded for resentencing under sections 12022.5, subdivision (c) and 12022.53, subdivision (h), amended effective January 1, 2018, to permit the court an opportunity to exercise its discretion to strike his firearm

enhancements. The People concede the point, agreeing that *People v. Francis* (1969) 71 Cal.2d 66 requires retroactive application of the above statutes to nonfinal judgments and following authorities such as *People v. Chavez* (2018) 22 Cal.App.5th 663 consistent with that holding. (*Chavez*, at p. 712.) In such cases, unless the record clearly indicates the trial court would have reached the same conclusion even had it been aware of its discretion, the case should be remanded for resentencing. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) We accept the People's concession, and accordingly remand for resentencing as indicated below.

3. *Request for Remand to Exercise Discretion to Sentence Concurrent Terms for Offenses Under the Three Strikes Law*

At Magana's sentencing hearing, the trial court initially expressed its intention to run the sentences on counts 2, 3 and 4 concurrently with the 55 year-to-life sentence on count 1. Following an unreported sidebar at the People's request however, the court stated that counsel had reminded it "that because you have the prior strike conviction, I'm going to sentence you consecutively on all the counts. I can't do them concurrently." Later, after hearing remarks from Magana's mother and further remarks from the prosecutor as to the People's settlement efforts, the court clarified: "[I]f someone looks at this—who knows when—down the road, I think an appropriate sentence here would be to run the sentences concurrent to give Mr. Magana at least the opportunity or the possibility of being released on parole after serving those 55 years and maybe even less than that, but I don't know. But if I could, I certainly would the terms and concurrently

and would have had that [*sic*]—had him eligible for parole after 55 years. But as I think we all agree, the law does not permit me to do that."

In his supplemental briefing, Magana contends that because the carjacking, assault, firearm possession and unlawful theft of the vehicle were committed on the same occasion and arose from the same set of operative facts, under the Three Strikes law, as clarified by *People v. Torres* (2018) 23 Cal.App.5th 185, consecutive sentences were not mandatory and the court retained discretion to impose concurrent sentences for the offenses. He asks that if we decline to reverse his conviction for vehicle theft and/or decline to stay the sentences on counts 2 and 4, that the matter be remanded for the court to exercise its informed discretion on imposition of concurrent sentences.

The People concede that the court had discretion to sentence Magana to concurrent terms on the counts 1 carjacking, count 2 assault and count 4 vehicle theft because they are serious and/or violent felonies committed on the same occasion or arising from the same set of operative facts. They agree that the court's mistaken belief warrants a remand for resentencing on those counts. But they maintain the court did not have discretion to sentence Magana to a concurrent term on the count 3 felon-in-possession- of-a-firearm conviction because it is not a serious and/or violent felony.

We accept the People's concession (see *People v. Torres*, *supra*, 23 Cal.App.5th at pp. 200-201 [Proposition 36 did not change the language of section 1170.12, subdivision (a)(6), and courts retain discretion to impose concurrent sentences for felonies that were committed on the same occasion or arose from the same set of operative facts]) and agree the count 3 offense is neither a violent nor serious felony (§§ 667.5, subd. (c) [felon-in-

possession of firearm not a "violent felony"], 1192.7, subd. (c) [felon-in-possession of firearm not a "serious felony"]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 792.) Hence, the trial court retains discretion to sentence Magana to concurrent terms on counts 1, 2 and 4, and on remand it may consider whether to exercise its discretion to do so.

4. *Remand to Exercise Discretion as to Prior Serious Felony Conviction*

Magana contends his case must be remanded for the trial court to exercise its discretion under sections 667 and 1385 to dismiss, in furtherance of justice, his five-year sentence enhancement for his prior serious felony conviction. The Legislature amended the law via Senate Bill No. 1393, effective January 1, 2019, to grant the court such discretion. (See Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement"].)

Though the People initially assert a ripeness challenge, they concede that if the law goes into effect before Magana's judgment becomes final, the new law will retroactively apply to him because it is an ameliorative change that provides for the possibility of a reduced sentence. The law is now in effect, so we accept the People's concession. (See *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307-308 & fn. 5; *People v. Brown* (2012) 54 Cal.4th 314, 323 ["When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all

defendants whose judgments are not yet final on the statute's operative date," fn. omitted]; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

Because at the time of Magana's March 2017 sentencing the court lacked the power to strike this enhancement (former §§ 667, subd. (a)(1), 1385, subd. (b)), remand is appropriate to give it the opportunity to exercise its newfound discretion. (See, e.g., *People v. Rodriguez* (1998) 17 Cal.4th 253, 258 [limited remand to permit trial court to make threshold determination whether to exercise its discretion to strike prior conviction allegation]; *People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1480 [defendants are entitled to " ' "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion' "]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, 427-428 [remanding for trial court to exercise new discretion to strike firearm enhancements where there was nothing in the record ruling out the possibility that the court would exercise its discretion to strike the enhancements].)

5. *Imposition and Stay of Prior Prison Term Enhancement*

Section 667.5 provides in part: "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] (b) . . . [W]here the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no

additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended. A term imposed under the provisions of paragraph (5) of subdivision (h) of Section 1170, wherein a portion of the term is suspended by the court to allow mandatory supervision, shall qualify as a prior county jail term for the purposes of the one-year enhancement."

In order to establish the enhancement provided by section 667.5, subdivision (b), the People must prove (or the defendant must admit) that the defendant served a prior *prison term*, not simply that he suffered a prior felony *conviction.* (See *People v. Riel* (2000) 22 Cal.4th 1153, 1203 [striking redundant second prison term finding where defendant had served only a single prison term; "the enhancement was for the prison term, not the convictions"].) Further, the People must prove any prior prison term was served separately. (§ 667.5, subds. (b), (d), (g); *People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Finally, they must prove the defendant either served time in prison or committed a crime leading to a felony conviction within five years of the prior prison term. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.)

Magana declined to bifurcate trial on the prior conviction allegations against him. The jury found true that Magana suffered the prior March 12, 2014 conviction, but its verdict form states only that Magana's prior conviction constituted a "serious felony," and

a conviction "within the meaning of . . . sections 667, subdivision (c) and (e)(1), and 1170.12, subdivision (c)(1)," indicating a prior strike.[10] Likewise, the court's minute order reads: "And we the Jury Find the Prior # 01 pursuant to Section 667 (C) PC True. [¶] And we the Jury Find the Prior # 02 pursuant to Section 667 (E) (1) PC True." Nevertheless, the court imposed but stayed a one-year enhancement for a prior prison term under section 667.5, subdivision (b). On remand for resentencing, the trial court should consider whether the prior prison term enhancement is supported by sufficient jury findings. (Compare, *People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17 [court implicitly but sufficiently rendered a true finding as to serious felony enhancement when it imposed an enhancement expressly for the underlying conviction on evidence of certified copies of the conviction].)

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10 The verdict form reads: "We, the jury in the above-entitled action, find that the defendant, ALEJANDRO FLOREZ MAGANA, has been previously convicted in the first special prior offense of the crimes of active participant in a criminal street gang and assault with force likely to cause great bodily injury, a serious felony, in violation of sections 186.22, subdivision (a) and 245, subdivision (a), subsection (4) of the Penal Code, in the Superior Court of the State of California, of the County of Riverside (INF1300528), on or about March 12, 2014, within the meaning of Penal Code sections 667, subdivision (c) and (e)(1), and 1170.12, subdivision (c)(1)."

DISPOSITION

The count 4 conviction for unlawful taking or driving is reversed. Magana's sentence is vacated in its entirety. The matter is remanded with directions that the trial court permit the People to elect within 30 days of issuance of our remittitur either to retry Magana for felony unlawful taking or driving under Vehicle Code section 10851, or to accept a reduction of this count to a misdemeanor. The court shall thereafter resentence Magana in accordance with this opinion, then prepare a new abstract of judgment and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment of conviction is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

DATO, J.